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25 February 2014

Dear Committee members,

RE: Youth Justice and Other Legislation Amendment Bill 2014

We welcome the opportunity to comment on the Youth Justice and Other Legislation Amendment Bill 2014.

This submission is informed by the author's extensive experience in the field of juvenile justice[1] and addresses key concerns in relation to the Bill's policy objectives.

Introduction

The proposed changes to juvenile justice legislation in Queensland need to be contextualised by considering other recently enacted changes to juvenile justice in this State. These include:

- The removal of the option of court referred youth justice conferencing – a decision criticised by the president of the Queensland children's court, Judge Michael Shanahan[2];
- The abolition of the youth and adult Murri court as a cost savings measure;
- The abolition of the youth and adult drug courts as a cost saving measure; and
- The introduction of boot camps as a sentencing alternative to detention.

The first three changes significantly reduce the sentencing and diversionary options available to children's court magistrates. The introduction of boot camps provides a new sentencing alternative. However, the international literature clearly shows that boot camps are ineffective in reducing recidivism and in some cases lead to

[1] The authors are currently members of the Comparative Youth Penality Project: an ARC Discovery Project comparing approaches to youth punishment, penal culture and practice in Australia, England and Wales. The CYPP is analysing developments in the punishment of children and young people over the last 30 years. The Project will compare between Australia (focusing on NSW, Victoria, Queensland and WA) and England & Wales. This is the first in-depth analysis of Australian youth penality and the first comparative study of youth punishment between these jurisdictions. For more information see: http://cypp.unsw.edu.au

[2] **Childrens Court of Queensland** 2013, *Annual report*, p. 5.

increased re-offending.[3] In addition, US research has shown that boot camps can lead to a negative cost to the state.[4]

It is also important to recognize that the UN Committee on the Rights of Child has been critical of Australia's human rights compliance in relation to children. In regard to Queensland, the Committee was particularly concerned regarding the failure to remove 17 year olds from the adult justice system in Queensland; and the failure to ensure that children were not held in adult prisons.[5]

Publication of identifying information about repeat offenders and opening the Children's Court

This amendment would contravene international law and is in stark contrast to accepted human rights principles. We submit that this proposal fails to recognise the context of young peoples offending and may be detrimental to their rehabilitation.

The presumption in international law is that, wherever possible, children and young people in conflict with the law should be dealt with outside of the formal justice apparatus. In this way the United Nations Convention on the Rights of the Child (UNCRC) provides that, whenever appropriate and desirable, States Parties shall promote and establish laws, procedures and measures for responding to children who have infringed the penal law *without resorting to judicial proceedings* (article 40(3)(b)).[6] Similar provisions are provided by a range of additional human rights guidelines and international standards; including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)[7], rule 11.

In cases where it is not deemed possible or appropriate to avoid formal judicial proceedings, it is a long-established principle of juvenile justice in Australia, as elsewhere in advanced democratic states, that the court should have regard for the welfare of the child. In international law this is expressed as the 'best interests principle'. Article 3 of the UNCRC provides that: 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall

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[3] **US Department of Justice** 2003, *Correctional boot camps: Lessons from a decade of research*, accessed 20/02/14 at https://www.ncjrs.gov/pdffiles1/nij/197018.pdf.

[4] **Drake, E, Aos, S & Miller, M** 2009, ' Evidence based public-policy options to reduce crime and criminal costs: Implications in Washington state', *Victims and Offenders,* 4(2), pp. 170-196.

[5] Committee on the Rights of the Child 2012, *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations, Australia*, sixtieth session, 29 May–15 June, CRC/C/AUS/CO/4, paras 82-84.

[6] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3. Adopted by the General Assembly A/RES/44/25 (20 November 1989). It entered into force on 2 September 1990, in accordance with article 49.

[7] UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* adopted by the General Assembly A/RES/40/33 (29 November 1985).

be a primary consideration'. This principle underlies the Charter of Youth Justice Principles, contained in Schedule 1 of the existing *Youth Justice Act 1992.*

The 'welfare' and 'best interests' principles are particularly salient with regard to children and young people in trouble. To publish information about children's cases in youth justice proceedings and/or to open the courts to the public would contradict these principles of international law and comprise violations of the spirit. Prohibiting the publishing of identifying characteristics of a young person appearing before or convicted by the children's court, is critical to avoiding future stigmatisation of the young person and to ensure maximum opportunities for personal growth and development.

Limiting the prohibition on publication as proposed by the Bill would seriously compromise the confidentiality of vulnerable children - including those in state care - and undermine safeguarding and child protection imperatives. Indeed the Australian Human Rights Commission has noted that Australia's human rights obligations clearly indicate that the names of juveniles involved in criminal proceedings should not be published.[8] There have also been calls for national consistency in the prohibition of publishing the names of children involved in criminal proceedings.[9]

All Australian states and territories (except the Northern Territory) have a general prohibition on identifying young people; notwithstanding that the extent of the prohibition and the circumstances in which publication can occur differ.[10] We consider this amendment to be unnecessary; as the Queensland judiciary already has power under s 234 *Youth Justice Act 1992* to identify juvenile offenders in more serious cases in the higher courts, if it is in the interests of justice to do so.

The research clearly indicates that publication is not an effective deterrent (as intended by the Bill)[11] and may in fact be detrimental to rehabilitation. Chappell and Lincoln note that disclosure is built on a false sense of shaming; may increase the potential for vigilante action; and provide a false sense of community protection.[12]

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[8] **Human Rights and Equal Opportunity Commission** 2007, 'Submission of the Human Rights and Equal Opportunity Commission to the NSW Legislative Council's Standing Committee on Law and Justice on the Inquiry into the prohibition on the publication of names of children involved in criminal proceedings', accessed 25/02/14 at https://www.humanrights.gov.au/submission-inquiry-prohibition-publication-names-children-involved-criminal-proceedings-2007

[9] **NSW Legislative Council** 2008, *Report of the Inquiry into the Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, NSW Legislative Council's Standing Committee on Law and Justice, Parliament, Sydney.

[10] **Australian Law Reform Commission** 2005, *Sentencing Federal Offenders*, Discussion paper 70, Commonwealth of Australia, Sydney, pp. 552-553.

[11] Explanatory Notes, Youth Justice and Other Legislation Amendment Bill 2014 (Qld), p. 3; Queensland Parliamentary Debates, Legislative Assembly, 11 February 2014, 46-48 (Hon JP Bleijie, Attorney-General and Minister for Justice).

[12] **Chappell, D & Lincoln, R** 2009, 'Shhh...We can't tell you: An update on the naming prohibition of young offenders', *Current Issues in Criminal Justice*, 20(3), pp. 482.

Identifying young offenders may 'label them as criminals at a formative time of their lives when there is a likelihood that they may not offend again.'[13] Criminologist Wilson also claims that public naming, with the idea of shaming the child into reform, does not work as a deterrence mechanism.[14]

Limiting the existing provisions in Part 9 of the *Youth Justice Act* to first offenders fails to recognise the context of young people's offending. Indeed, abundant *evidence* reveals that children and young people who are most heavily embroiled in youth justice systems - *especially 'repeat offenders'* - are routinely drawn from profoundly disadvantaged families, neighbourhoods and communities.[15] For such children the fabric of life invariably stretches across poverty; family discord; public care; drug and alcohol misuse; mental distress; ill-health; emotional, physical and sexual abuse; self-harm; homelessness; isolation; loneliness; circumscribed educational and employment opportunities and the most pressing sense of distress and alienation. Within this context, the closed and confidential nature of children's court hearings for youth justice proceedings is vital.

Findings of guilt while on bail

This suggestion is both unnecessary and objectionable.

It is unnecessary because the commission of an offence on bail may already lead to a number of legal consequences. First the child may be charged with the new offence. Second the child's existing bail may be revoked. Third the commission of a fresh offence whilst on bail may be taken into account in any decision whether to grant bail at a further hearing, either in relation to the current charge or to other or future charges. The situation is already more than adequately covered and such a proposal is entirely unnecessary.

It is also objectionable as it is a form of double jeopardy. The child will, as it is, potentially face a charge arising out of the fresh offence. So that, according to this proposal, they would also be liable for an additional penalty for what is essentially the same offence, a form of double jeopardy.

The approach to bail in relation to juveniles should be as set out in the recent NSW Law Reform Commission (LRC) *Report on Bail No 133*. In chapter 2, Bail and the criminal justice system, the Commission states:

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[13] **Dixon, N** 2002, *'Naming juvenile offenders - Juvenile Justice Amendment Bill 2002 (Qld)'*, Research brief no. 22, Queensland Parliamentary Library, Brisbane, p. 8.
[14] Ibid; **Eccleston, R** 1998, 'Courts battle identity crisis: Anonymity protects young offenders from public shame and scrutiny', *The Australian*, 8 December, p. 8.
[15] **Jesuit Social Services and Effective Change Pty Ltd** 2013, *Thinking Outside: Alternatives to remand for children*, Jesuit Social Services, Richmond, p. 13; **McKenzie, J** 2013, *Insights from the coalface: The value of justice reinvestment for young Australians*, Australian Youth Affairs Coalition, p. 11.

> The law has long recognized that it should treat young people differently, reflecting their lesser maturity and capacity to male considered decisions. Specialist courts, different procedures and separate legislation have been developed, and there is often a particular emphasis on mediation, reparation, restorative justice and rehabilitation.[16]

In chapter 11 Special Needs and Vulnerability, the NSW LRC goes on to set out the 'special characteristics of young people'. These include: lack of knowledge and experience; dependence; impulsivity and lack of foresight; difficult life circumstances; different capacities acknowledged in other laws; and the impact of remand on young people.[17] After examining these characteristics the NSW LRC recommends a range of matters that should be taken into account when making a bail determination in relation to young people.[18] We commend the approach of the NSW LRC and its recommendations to the Legal Affairs and Community Safety Committee. It is an approach entirely at odds to the tenor of the current proposal point 2 in relation to the commission of an offence whilst on bail and is substantially at odds to the policy objectives of the proposed Bill, on which the Committee is to report.

The proposed changes to bail legislation are also likely to have a particularly negative impact on Aboriginal and Torres Strait Islander young people. The existing data shows clearly that Queensland has a very high number of Aboriginal and Torres Strait Islander juvenile remandees in detention. In the June quarter 2012, Queensland had the second largest number of unsentenced Aboriginal and Torres Strait Islander juveniles in detention in Australia, after NSW.[19] The proportion of the total number of Aboriginal and Torres Strait Islander juveniles in detention in Queensland who are detained unsentenced is also very high. In the June quarter 2012 over 70% of all Aboriginal and Torres Strait Islander juveniles in detention in Queensland were there on remand, the remaining 30% being sentenced detainees.[20]

While we do not know from this data how many Aboriginal and Torres Strait Islander young people were remanded as a result of breaching existing bail conditions and how many were initially refused bail, we can reasonably expect that a significant proportion would fall foul of the proposed legislation. One result will be the further entrenchment of Aboriginal and Torres Strait Islander young people in the juvenile justice system by adding to their criminal histories.

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[16] **NSW Law Reform Commission** 2012, *Bail,* report no. 133, Law Reform Commission, Sydney, para 2.33.
[17] Ibid, paras 11.8-11.26.
[18] Ibid, rec. 11.1.
[19] **Australian Institute of Health and Welfare** 2012, *Juvenile detention population in Australia: 2012*, Juvenile Justice Series no. 11, Canberra: AIHW, table S11.
[20] Ibid, tables S11 and S21.

Detention as a last resort

Enacting this amendment would result in a serious breach of international law.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) were adopted by the United Nations General Assembly in 1985.[21] Rule 19.1 states: 'the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period' and Rules 17.1(b) and 17.1(d) provide: 'restrictions on the personal liberty of the juvenile shall... be limited to the possible minimum' and 'the well-being of the juvenile shall be the guiding factor in his or her case'.

The United Nations Guidelines on the Prevention of Delinquency (the Riyadh Guidelines) were adopted by the United Nations General Assembly in 1990.[22] Paragraph 5 of the Riyadh Guidelines provides: 'formal agencies of social control should only be utilized as a means of last resort'.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) were adopted by the United Nations General Assembly in 1990.[23] The Havana Rules centre a number of core principles including: deprivation of liberty should be a disposition of 'last resort' and used only 'for the minimum necessary period'; and, in cases where children are deprived of their liberty, the principles, procedures and safeguards provided by international human rights standards, treaties, rules and conventions must be seen to apply.

The 'last resort' provisions contained within the Beijing Rules, the Riyadh Guidelines and the Havana Rules were bolstered when the UNCRC came into force. Australia adopted the UNCRC in 1989 and ratified it in 1990. Article 37b of the UNCRC provides: 'imprisonment of a child shall be… used only as a measure of last resort and for the shortest appropriate period of time'.

The principal organisational mechanism for monitoring the implementation of the UNCRC into law, policy and practice in Australia and elsewhere, is the UN Committee on the Rights of the Child - comprising 18 democratically elected members drawn from the 193 States Parties that have ratified the Convention. The Committee's 'General Comment' in respect of juvenile/youth justice[24] emphasises the principle that youth justice systems must seek to safeguard the child's dignity at *every point of the justice process* and stresses that recourse to judicial proceedings

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[21] See note 7.
[22] UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)* adopted by the General Assembly A/RES/45/112 (14 December 1990).
[23] UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* adopted by the General Assembly A/RES/45/113 (2 April 1991).
[24] Committee on the Rights of the Child 2007, *General Comment No. 10: Children's Rights in Juvenile Justice*, Forty-fourth session, 15 January - 2 February, CRC/C/GC/10.

(and especially custodial detention) should only ever be operationalised as measures of *last resort*.

The proposal to remove the 'last resort' principle from sections 208 and 150, and from the Charter of Youth Justice Principles, threatens to place the state of Queensland in violation of a substantial corpus of international law. It also departs from the accepted approach as upheld by every other Australian state and territory.[25]

The omission of this fundamental principle and the emphasis of detention as a 'realistically available' and appropriate sentence[26] will inevitably lead to an increased use of incarceration. Research illustrates that imprisonment can have negative impacts on young people, resulting in a decrease in wellbeing and an increase in offending or recidivism.[27] We caution against this approach and submit that the principle of 'last resort' must be preserved in Queensland, as elsewhere in Australia.

Transfer to adult correctional facilities

This policy objective also poses a breach to international law and disregards the repeated observations of the UN Committee on the Rights of the Child.

Since the establishment of discrete juvenile justice systems in Australia (and elsewhere in the western world) in the 19th century, the practice of separating children from adults in penal facilities has been driven in part by knowledge of the negative consequences of exposing children to more 'hardened' adult offenders and the associated desire to reduce the risk of 'contamination'.

Furthermore, as stated above, there is a substantial volume of international evidence illuminating the fact that many child/youth prisoners have compelling (unmet) welfare needs and many children and young people import multiple vulnerabilities into penal institutions. There is also widespread knowledge of bullying in youth custody, whereby younger children are particularly prone to intimidation from older youths (and adults). On both counts - reducing the prospect of 'contamination' and offsetting the risk of harm - it is imperative to ensure that children are completely separated from adults in penal detention.

With regard to international law, Article 1 of the UNCRC defines a child as 'every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'. Furthermore, Article 37(c) of the Convention

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[25] *Children (Criminal Proceedings) Act 1987* (NSW) s 33(2); *Children, Youth and Families Act 2005* (VIC) ss 410(1)(c), 412(1)(c); *Young Offenders Act 1994* (WA) s 120; *Children and Young People Act 2008* (ACT) s 94(1)(f); *Young Offenders Act 1993* (SA) s 23(4); *Youth Justice Act 1997* (TAS) s 5(1)(g); *Youth Justice Act 2006* (NT) s 81(6).
[26] Explanatory Notes, see note 11, p. 5.
[27] **McKenzie, J** 2013, see note 15, p. 16.

makes special provision for the rights of children deprived of their liberty and, in particular 'every child deprived of liberty shall be separated from adults unless it is considered in the child's interests not to do so'.

Furthermore, according to the United Nations Committee on the Rights of the Child, this means, put simply, that no child deprived of his/her liberty shall be placed in 'an adult prison or other facility for adults'.[28] Underpinning this right, the Committee refers to 'abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate'.[29]

Additionally, the imperative to ensure the separation of child and adult prisoners has been reinforced by the European Committee for the Prevention of Torture (CPT), the body established under the Council of Europe's *European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment*. Indeed, the experience of the CPT - which conducts periodic and *ad hoc* inspections of detention facilities throughout the 47 Council of Europe member states - has led to it recommending a strengthening of the UNCRC Article 37 standard and the removal of any exception to the rule that child prisoners should be separated from their adult counterparts[30], noting that 'the risks inherent in juvenile offenders sharing cellular accommodation with adult prisoners are such that this should never occur'.[31]

International law is clear that in such cases where penal detention for children and young people is deemed unavoidable, placing children in *adult* prison detention is singularly inappropriate. It follows that 'States Parties' should establish 'separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.'[32] More generally, Article 40 of the UNCRC provides that every child alleged as, accused of, or recognised as having infringed the criminal law has a right to be treated:

> 'in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the rights and freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.

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[28] See note 24, para 85.
[29] Ibid.
[30] Committee for the Prevention of Torture and Inhuman or Degrading Punishment 2008, *18th General Report on the CPT's activities*, CPT/Inf (2008) 25, Council of Europe.
[31] Committee for the Prevention of Torture and Inhuman or Degrading Punishment 2009, *Report to the Portuguese Government on the visit to Portugal carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),* CPT/Inf (2009) 13, para 42. For a fuller discussion see: **Goldson, B & Kilkelly, U** 2013, 'International human rights standards and child imprisonment: Potentialities and limitations', *International Journal of Children's Rights*, 21(2), pp. 345-371.
[32] See note 24.

As noted above, the UN Committee has repeatedly expressed concerns regarding Queensland's failure to remove 17 year olds from the adult justice system; and the failure to ensure that children are not held in adult prisons.[33] The replacement division 2A fails to take into account the Committee's observations. Instead of including 17 year olds within the juvenile justice system as recommended, this Bill further compromises 17 year olds right to protection.

The removal of discretion and the absence of an appeal process in regard to transfers are also causes for concern. Failure to assess the merits of an individual case may result in highly inappropriate outcomes, particularly where there is substantial risk of harm to the young person. The absence of a review mechanism may exacerbate this injustice.

Summary

- We recommend that children's courts proceedings remain closed and confidential; and that non-publication provisions extend to all young offenders.
- We recommend the Queensland Government adopt the approach outlined in the New South Wales Law Reform Commission report on Bail in relation to young people.
- We recommend the principle of 'detention as a last resort' be maintained as paramount when sentencing young people.
- We recommend the Queensland Government include 17 year olds in the juvenile justice system and ensure that 17 year olds are not held in adult prisons.

We appreciate the opportunity to comment on this Bill; and hope that our submission will contribute to the development of juvenile justice policies that promote the human rights of young people in Queensland.

Yours sincerely,

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Professor Eileen Baldry, *University of New South Wales*

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[33] Committee on the Rights of the Child 2005, *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations, Australia*, fortieth session, 20 October, CRC/C/15/Add.268, para 74(g); Committee on the Rights of the Child 2012, see note 5, para 83.

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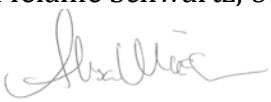

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